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LAW AND EVOLUTION

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Certain dicta, appearing recently in the *YALE LAW JOURNAL*¹ appear to me to invite a few comments. A discussion as to the appropriateness of the term "legal evolution" requires a preliminary indication of the terms "law" and "evolution" since both are used in ordinary speech in very different senses. In *The Austinian Theory of Law*,² I define "law" as the organic totality of the rules relating to external human action, together with the associated systems of rights and duties which those rules imply, affirmed by the State through official organs, maintained by the organized power of the State, and applied by the courts of the State in the discharge of their judicial functions. The definition assumes the validity of certain arguments amplified in the preceding pages. For present purposes, it is perhaps sufficient to say that I understand the term "law" to mean a system of rules of conduct as enforced in courts of justice. The word "system" connotes here an organic or *quasi*-organic interrelation of parts. Whatever a lawyer may say when he is theorizing, he recognizes in actual practice this interrelation. It is more necessary, perhaps, to dwell on the fact that, since law is what courts enforce, a distinction exists between the ostensible and the real law. A judge may give a decision, purporting to be declaratory as regards the relation between law and a particular group of circumstances, and possibly establishing, by authority of precedent, a rule of law. A legislature enacts a statute. Both the language of judges and the text of a statute are ostensible law. To speak of an act of the legislature as ostensible law may seem a contempt of the "High Court of Parliament," but it is a recognition of the fact that what the legislature enacts, judges interpret. The sociologist *may* say that a statute is an expression of a general will; the lawyer is *bound* to say that the law is as the judges decide. He knows from practical experience that the metamorphoses which take place in the process of applying an enactment to the infinitely varying groups of facts, are such as to warrant the statement that the enactment is but ostensible law. I take this as not negating the view of law as State ordained. The judge is an organ of the State. Before any judicial interpretation has been given a citizen may follow rules of conduct deemed to be in harmony with statutory texts, with varying

¹ Judge Gager's *REVIEW of Formative Influences of Legal Development* in (1919) 28 *YALE LAW JOURNAL*, 617; and Professor Keller, *Law in Evolution* (1919) 28 *ibid.*, 769.

² Brown, *The Austinian Theory of Law* (1906) 354.

degrees of certitude according to the circumstances of the case. The statute binds before it is judicially interpreted; but what the statute means or does may be on the lap of the Gods. To distinguish between law and the interpretation of law, though permissible for certain purposes as a short way of saying things, invites confusion between the ostensible law and the real law, since it is *textual formulation as interpreted* which constitutes law, whether for scientific or for practical purposes. We may protest against the occasionally excessive subjectivity in the processes of judicial interpretation without shutting our eyes to the fact that an element of subjectivity necessarily exists. Bishop Hoadley was only guilty of a pardonable exaggeration when he declared that it did not matter so much who made the law as who interpreted it. When a solicitor advises his client that an action will not succeed he is predicting what view judges are likely to take. He does not *know*; he *anticipates* with varying degrees of certitude. The result may be unfortunate from the point of view of the law student in search of finalities. To others than students of law, it is disagreeable to substitute the indefinite for a definite quantity. But it is better to recognize an element of indefiniteness than to perpetuate a fiction. When a judge says, "This text is the law; I have only to apply it," he should be taken in all charity to mean, "This text is the declared law; and my duty is to interpret and apply it to the circumstances before me." Given certain facts, the interpretation and application may at times be more or less mechanical. If we take a wider view, and especially if we regard law as a whole, even the most authoritative texts (legal principle or rule) will be found to have a degree of elasticity as it is interpreted and applied. If we shirk this plain fact we abide on the surface of things. If we accept the fact we have to recognize that law, as the resultant of forces of which the mind of accredited interpreters is one, must necessarily change from generation to generation, however stereotyped in form may be what is popularly called law. The rate of change varies with circumstances of time and place; the change may be so slow as not to be apparent; but it takes place.

The suggested analogy between law and a pile of bricks is palpably false to reality for two reasons. In the first place, the analogy implicitly ignores the distinction between formulated texts and the law. In the second place, even if the term "law" were limited to formulated texts, the fact would remain that additions to those texts are affected by, and react upon, the character and meaning of pre-existing texts. For example, the actual rules which govern the life of the citizen, in so far as legal relations fall within the ambit of a particular statute, are determined both by the organic or *quasi*-organic interrelation of a totality of statutes and precedents, and by the mental attitude of judges who bring to the statute an equipment derived from the history of the race and the environment of a particular generation. We may

say, if we like, that the statute remains fixed without any tendency to change or develop. As a matter of fact, however, the statute does not mean—cannot mean—to one generation just what it meant to a preceding generation.

The question whether legal change is of a kind to justify the use of the term “legal evolution” is another matter, and calls for some indication of the meaning of the word “evolution.” The “theory of evolution” has varied from time to time. But I think we may fairly use the term “evolution” to indicate a process by which a result is arrived at, not by “special creation” but by the survival of types best fitted to survive under the conditions of a particular if changing milieu. Variations in offspring are postulated. The variation may even approximate to (or be) a mutation. But the character of the process may be illustrated by saying, for example, that man was not created *de novo* in a Garden of Eden, but is the product of a long process, extending over an indefinite period, in the course of which there were many stages, much conflict between pre-human species and individuals, and a general trend or tendency towards the survival of the fittest. The fittest may or may not be more complex in form. The essential things are adaptation to environment and a gradual but progressive elimination of individuals or species least able to respond to the call of circumstance.

Is there a *tendency* in law to develop? The answer may be in the negative if we limit the term “law” to textual formulation. But if we remember that statute and precedent alike have to be interpreted as well as applied by successive generations of judges, we must concede that there is in law a tendency, if not to develop, at any rate to change. Assuming a tendency to change, the question of the direction of the change, whether upward or downward, is irrelevant for the purpose of considering the propriety of the use of the term “legal evolution.” Biological evolution implies change; but the change may be upward or downward. The word “development” connotes an upward tendency; but the evolution of life on earth is conditioned by the call of circumstance. That call may be for higher or for lower types according to the tests of complexity, heterogeneity, or any ethical standard which may chance to dominate the mind of the observer.

I presume that a jurist who speaks of “legal evolution” has not in his mind the idea of a tendency in legal texts to wriggle uncannily as if possessed of the Devil. They are possessed, however—possessed of *man*. A judge who determines to give to an ancient text its precise ancient meaning strives after the impossible because he would be other than human, if he could approach the ancient text with precisely the same mental attitude and equipment as the judge of an ancient generation. The weight of the dead hand has to be recognized; but it cannot be regarded as if it were the sole factor in a product to which the mind of successive generations contributes. When the legislature

passes a new statute it works, consciously or unconsciously, on old material as envisaged in the light of a new generation. Again, when the statute is passed, it cannot be interpreted otherwise than in some relation, however imperfect or unconscious, (ideally in organic relation), to the totality of law. Even if a legislature enacts a "complete code," the formulation and interpretation of the code are conditioned by the environment and history of the people. Neither the legislature nor the judge can escape the influence of environment. Some bad decisions, many bad statutes, suggest a futile attempt at "special creation." Variations may be made; the variation may approximate to a mutation. The dead hand of the past cannot be wholly eluded any more than an element of subjectivity in the mind of the judge. "The forms of action rule us from the grave." I may presume to add, "*sub modo*."

The more obvious difference between the processes of legal change and of biological evolution is that in biological evolution the range of influence of what are sometimes called "the blind forces of nature" is more apparent. The difference, for what it is worth, should be recognized. Professor Keller says, speaking of adjustment,

"Adjustment may be mental without being deliberate, purposeful, rational, or even conscious. Folkways are empirical, not planful. Those who practice them can seldom give rational excuse for so doing."³

The learned writer appears to me to underrate, rather than exaggerate, the importance of the element of purpose in legal change. The inability to give a rational excuse for a variation or adjustment is no proof of the absence of a reason or purpose for the variation or adjustment. The end may be too dimly conceived to be expressed by the individual, or a society, which makes an adjustment. A man may be able to whistle, and yet have a tune in his head that he cannot even whistle. Business men *do* things; they achieve; they arrive—often without being able to give any intelligent account of their success, even to themselves. It is well known that Sir Joshua Reynolds' book on *Painting*⁴ offers little or no guidance to those who wish to become famous painters. Books on literary styles are notoriously lacking, speaking as a rule, in practical utility. Many other examples might be quoted. They serve to illustrate, not a lack of purpose, but the limitations of the human mind to express purpose.

The question arises whether this difference between legal change and biological evolution, to the extent that it exists, goes so far to the root of the matter as to make the use of the term "legal evolution" objectionable. To answer this question is difficult because of the varieties

³ Keller, *ibid.*, 775.

⁴ Reynolds, *Discourses on Painting* (1825).

of opinion expressed or held by exponents of "the theory of biological evolution." Some admit, some deny, mutation. I am not certain to what extent present day exponents of biological evolution would exclude from the concept of evolution the breeding of animals in an environment where *one* of the factors of the process is the mind of the breeder. But, supposing this factor to be excluded, the possibility of all superhuman supervision of biological evolution is not necessarily excluded. Again, when we speak of the evolution of a particular species, there is not excluded the possibility of mental or *quasi*-mental processes in the course of adjustment to environment. If the fittest survive, the result is not invariably due to extraneous causes. *Inter alia*, sex selection operates. My conclusion is that the existence and degree of the element of purpose in legal change are not, *per se*, an answer to the appropriateness of the use of the term "legal evolution." All that we are justified in saying is that in the case of law conscious, if unformulated, purposes play a more important and a more apparent rôle than in biological evolution. This would only amount to saying that "legal evolution" is evolution of a particular character, if it be conceded that legal change exhibits the processes which constitute the stock in trade of the evolutionist in biology.

I am in agreement with those who speak of the "evolution of law." I find in legal history an inevitable tendency to change, a continuing adjustment to environment, and a process of survival of the fittest, in the course of which the rules of human conduct less fitted to a particular milieu are squeezed out of existence and give way to rules best fitted for that milieu. Tradition may be substituted for heredity, and the element of purpose (whether expressed by legislators or applied by judges) may be more potent and apparent in the processes of change. Such differences do not preclude an analogy between legal history and biological evolution. True, formulated texts of law are not "red in tooth and claw." But without dwelling too much on the exaggerated respect paid in the past to this aspect of biological evolution, there is an increasing "conflict of laws" in a sense other than that consecrated by usage. In any case, I do not presume to say that every exponent of what is called the "theory of evolution" should accept the conclusion I have indicated. The "theory of evolution" means such different things to different authorities that I am driven to dwell in the realm of what I may call the lowest common measure. Subject to this understanding, I think the term "legal evolution" a useful and suggestive way of expressing some of the most fundamental characteristics of the long process involved in the history of law. A novel statute or precedent suggests to my mind variation (purposeful, perhaps, but still variation) in a general flow of things in which there is a continuing response to the call of circumstance—adjustment to environment. The nature of the process is apt to be observed by that lack of perspective which prevents us from seeing

the old and the new in their true relation. The legislator is not, as he may imagine himself, a Columbus. Not infrequently, he is merely making explicit what was really implicit in pre-existing law. When, however, he perpetuates a variation, the survival of the variation, as in biology, awaits the tests of time and circumstance.

I have but one more comment to make. Judge Gager writes:

"The only active element causing change lies, not in law itself, but in the action of the human mind, creating, modifying, discarding ideas of that class collectively dominated law."⁵

I quote this sentence because it might be taken to suggest that the mind working on legal texts is the mind actively responsible for legal change. Normally, change in law may be the result of the conception of an end more or less dimly conceived by those whose laws are under consideration. But I feel bound to ask the question whether change in law invariably takes place in the way suggested. Some indirect results of the intrusion of an alien race, or of alien ideas, a catastrophe in nature, or the purposeless incidentals of a revolution in the social order, may effect legal changes in ways which, from the point of view of *process*, are suggestive of biological changes due to those "blind forces of nature" upon which some exponents of the "theory of evolution" lay so much emphasis when they object to the use of the term "evolution" in the realm of sociology.

Assuming the foregoing conclusions together with their implications to be sound, the question naturally arises as to their importance for the "practical" lawyer. Some will answer, "None at all." To the lawyer striving to understand and to interpret existing texts by the aid of the apparatus of ideas which modern thought provides, the answer will be otherwise. Fortunately, we build better than we know; and the lawyer who prides himself upon his adherence to forms, texts, and the ostensible generally, is often not so "practical," in the invidious sense of the term, as he imagines himself to be. So also of the judges, though with regard to the latter it may be well on occasion that an advocate should choose his language wisely. Some judges, who would listen with complacency to a learned argument based on assumptions about *legal growth*, would be instantly ruffled if the term "*legal evolution*" were used. An august tribunal, which some years ago gave evidence of being shocked by a reference to the concept of the *juristic person* shortly after gave judicial approval to the expression "the brains of the corporation." I even think, if I remember aright, that the learned judges talked with freedom of the *head* and the *seat* of a corporation! The really practical lawyer will employ his scientific equipment to aid him in arriving at sound conclusions, but will express these conclusions with due regard to judicial

⁵ Gager, *ibid.*, 618.

infirmities! A learned judge once protested to me in private against certain views expressed or implicit in this article. A reference to his note books, however, revealed an accumulation of decisions in which what I had said expressly had been tacitly, if unconsciously, assumed. The ancient fiction that judges never added to, but only applied, pre-existing law, has been long since discredited. There are still judges, however, who cherish the fiction that a statutory text or a legal principle or rule may have all the certitude and inelasticity of a mathematical proposition or chemical *formula*. When a lawyer pleads before such a judge his method of approach will be flank rather than frontal. The tact required of the judge is proverbial. But what of the tact required of the advocate who lives in an age of seemingly rapid transition, and in a world where thought dwelleth not in watertight compartments!